Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
	)	
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

REPLY COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

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REPLY COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association (NCTA) submits these reply comments in the above-referenced proceeding.[1] The Commission's goal should be to promote the deployment of all types of broadband networks, regardless of the technology used. Accordingly, the Commission should interpret Section 253 in a manner that avoids extreme delays or burdens that would have the effect of prohibiting deployment, irrespective of the technology used by the provider.

INTRODUCTION AND SUMMARY

The record in this proceeding demonstrates that all types of providers are planning significant new deployment of broadband facilities. Most of these networks will provide a variety of services using facilities that incorporate both wireline and wireless technology. Accordingly, the Commission should ensure that its efforts to streamline broadband deployment obligations encourage all providers to deploy new facilities, regardless of technology, rather than limiting its focus solely to the small cell issues addressed in the Mobilitie petition and Wireless Telecommunications Bureau notice.

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[1] Public Notice, *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, WT Docket No. 16-421, DA 16-1427 (rel. Dec. 22, 2016) (Notice); Mobilitie LLC Petition for Declaratory Ruling, WT Docket No. 16-421 (filed Nov. 15, 2016) (Mobilitie Petition).

To that end, there are two concrete steps the Commission can take now under Section 253 to address specific practices that burden and delay deployment. First, the Commission should declare that where a franchised cable operator already has the legal authority to construct and operate facilities in the right-of-way, it is unreasonable for a state or local government to then require that provider to obtain additional licenses or authority (or pay additional right-of-way fees) in order to offer broadband services over those authorized facilities. Second, the Commission should clarify that, when assessing whether state or local government fees for the use of rights-of-way are "competitively neutral and nondiscriminatory" within the meaning of Section 253(c), the inquiry should look beyond fees applicable to specific network technologies and take into account the full scope of fees and obligations already borne by providers, including any revenue-based franchise fees.

I. THE COMMISSION SHOULD TAKE A HOLISTIC APPROACH TO PROMOTING DEPLOYMENT, RATHER THAN LOOKING AT SMALL CELL ISSUES IN ISOLATION

The record establishes that massive deployment of new broadband facilities is expected over the next decade.[2] Most of these new or upgraded networks will incorporate both wireless and wireline equipment and be capable of providing a range of services subject to a variety of regulatory regimes. For example, the record makes clear that densification of wireless networks will require significant new deployment of both wireless and wireline equipment because "the

[2] *See, e.g.*, Wireless Infrastructure Association (WIA) Comments at 2 (FCC's commitment to a "regulatory environment that promotes wireless infrastructure deployment" is "more necessary than ever, as market developments converge to require intensified infrastructure deployment."); CTIA Comments at 2 ("5G will require dense wireless networks, deployment of hundreds of thousands of new small cells, and expanded backhaul and transport facilities to provide needed capacity and coverage."); Competitive Carriers Association (CCA) Comments at 5 ("One study estimates that as much as $275 billion will be invested over the next seven years; $93 billion is expected to be spent on construction, with the rest allocated toward network equipment, engineering, and planning."); NTCA Comments at 3 ("Broadband providers of all kinds continue to invest heavily in their networks to help ensure they are prepared to me the customer demands of the future.").

backhaul and transport facilities required to connect small cells with core networks and provide customers with reliable Internet connectivity need to be located in ROWs."[3] As NTCA explained, "5G networks are predominantly landline deep fiber networks, with only a very small portion of their network using a wireless technology."[4]

Similarly, cable operators have plans to upgrade their hybrid-fiber coax networks as well as expand their wireless capabilities. The largest cable operators all have announced that they will be upgrading their wireline networks to include more fiber deployment, including some operators' plans to move to a fiber-to-the-premises service.[5] Cable operators also are continuing to explore wireless options as well, using both licensed and unlicensed spectrum.[6]

Regardless of the technologies they use, providers of all types see this new deployment as a huge opportunity that could be constrained by certain overzealous regulation of access to public rights-of-way.[7] The Mobilitie petition seeks to address some of these concerns through interpretation of key provisions in Section 253 of the Act, and the Public Notice issued by the Wireless Telecommunications Bureau identifies additional areas where federal guidance may

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3 CTIA Comments at 2

4 NTCA Comments at 3.

5 *See, e.g.*, FierceCable, *Cable Capex: Comcast, Charter to Ramp Up Network Spending for Combined $16B Outlay in 2017* (Mar. 23, 2017, at http://www.fiercecable.com/cable/cable-capex-top-ops-comcast-and-charter-stabilize-cpe-spending-but-ramp-up-network; LightReading, *Altice Plans FTTH For Entire US Footprint* (Nov. 30, 2016), at http://www.lightreading.com/gigabit/fttx/altice-plans-ftth-for-entire-us-footprint/d/d-id/728657.

6 *See, e.g.*, Fortune, *Expect Heavy Combat Between Cable and Wireless in 2017* (Dec. 29, 2016), at http://fortune.com/2016/12/29/heavy-combat-cable-wireless/.

7 *See, e.g.*, CTIA Comments at 2 ("The tremendous promise of 5G is, however, threatened by a growing web of local siting restrictions and requirements that delay, discourage, or outright block the new infrastructure needed to accommodate the public's growing demand."); CCA Comments at 8 ("As evidenced by these examples, state and local siting requirements too often slow deployment significantly or halt broadband projects entirely. Even though some states and localities act promptly and correctly, the aggregate impact of those that do not greatly stifles deployment by carriers of all sizes, and cries out for informed Commission action to reduce state and local barriers to broadband deployment."); NTCA Comments at 4-5.

help streamline the deployment process, particularly with respect to small cell deployment.[8] Separately, the Commission will consider proposals at its April agenda meeting to open two proceedings to consider ways in which it might streamline the deployment process for wireline and wireless infrastructure respectively.[9]

Concerns have been raised in the record that certain problematic actions by state and local officials could undermine the Commission's broadband objectives absent expansive federal intervention.[10] Although most of the focus is on wireless deployment, NTCA correctly points out that wireline providers may face similar obstacles.[11]

In the face of this record, the challenge for the Commission is to streamline deployment requirements where warranted without unduly constraining state and local management of the public rights-of-way or improperly placing a thumb on the scales in favor of one technology or one class of providers over others. NCTA supports Commission efforts to eliminate extreme delays and burdens on deployment, but we encourage the agency not to focus exclusively on small cell deployment. Instead, the Commission should consider right-of-way issues in a more holistic manner that considers the interests of all providers, both new entrants and existing providers, and all types of technologies, both wireless and wireline.

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8 Mobilitie Petition at 23-35; Notice at 8-14.

9 *See* Blog of Chairman Pai, Infrastructure Month at the FCC (Mar. 30, 2017).

10 Mobilitie Comments at 1 ("Local governments that erect regulatory barriers to advanced broadband networks forget their charter to serve their citizens. They deprive citizens, visitors, schools, organizations and businesses of the benefits that broadband can deliver. Mobilitie urges the Commission to take immediate, comprehensive actions to remove the regulatory barriers that are obstructing deployment of advanced wireless broadband networks."); WIA Comments at 6 ("WIA members have uniformly reported on the epidemic of significant delays experienced in jurisdictions throughout the country when seeking to deploy small wireless facilities in the public right-of-way.").

11 NTCA Comments at 4 ("Both wireline and wireless providers face challenges in gaining reasonable and timely access to federal and municipal rights-of-way. NTCA's members report that some localities refuse to negotiate ROW access agreements, or needlessly extend the negotiating process. ROW and pole attachments may be looked at as revenue generating and fees for access may be far removed from the cost of providing access.").

In applying this holistic approach, the Commission should account for the fact that many states already are considering legislation that would address small cell deployment issues. Over the past year, bills addressing small cell deployment issues have been enacted in three states (Arizona, Kansas, and Ohio), passed by the legislature in two more (Colorado and Virginia), and are under consideration in 16 additional states.[12] Recent reporting suggests that many states are making progress in identifying solutions that balance the respective interests of all the parties involved.[13] The Commission generally should be encouraging such efforts where they will promote new deployment without disfavoring existing providers, while leaving room for federal intervention that may be necessary to remove unwarranted or discriminatory regulation as described in the next section.

As a process matter, the Commission has taken a number of steps that are conducive to the type of holistic analysis these issues require. For example, the decision to open new proceedings for both wireline and wireless infrastructure will provide parties an opportunity to raise the fully range of right-of-way issues affecting broadband deployment, although it will be critically important for these two proceedings to be tightly coordinated, rather than proceeding in separate silos with separate personnel. It also will be important for the Commission to incorporate input from the Broadband Deployment Advisory Committee (BDAC) before adopting any new rules.[14] The BDAC has a roster of experts representing all the affected parties

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[12] Small cell bills have been introduced in Arkansas, California, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Minnesota, Missouri, Nebraska, New York, North Carolina, Rhode Island, Texas, and Washington.

[13] Communications Daily, *Municipalities, Industry Find Compromise on State Small-Cells Bills* (Mar. 23, 2017) at 9 ("Expect 'more instances where locals and industry sit down and try and work this stuff out' [NATOA Executive Director Steve Traylor] emailed Wednesday. 'There is still a lot of misunderstanding about 5G, the IoT, what densification means, what's going to happen to rural folks, etc. I think sitting down at the table helps to clear up a lot of the confusion – on both sides.'").

[14] Public Notice, GN Docket No. 17-83, *FCC Announces the Membership and First Meeting of the Broadband Deployment Advisory Committee*, DA 17-328 (rel. Apr 6, 2017).

and therefore should be well situated to offer input to the Commission on the issues presented in this docket.

II. THE COMMISSION SHOULD INTERPRET SECTION 253(C) IN A MANNER THAT PROMOTES A LEVEL PLAYING FIELD AND AVOIDS EXTREME DELAYS OR BURDENS ON ANY TYPE OF DEPLOYMENT

The Mobilitie petition seeks a declaratory ruling from the Commission interpreting various provisions in Section 253(c) of the Act. In particular, Mobilitie asks the Commission to find that certain fees that have the effect of prohibiting deployment are generally not "reasonable" and "nondiscriminatory" for purposes of that section.[15] As noted above, the Commission's goal should be to promote broadband deployment by all types of providers regardless of technology.[16] Below we address specific types of state and local requirements that the Commission should use this opportunity to declare unreasonable and discriminatory for purposes of Section 253(c), as well as considerations that should guide the Commission's inquiry with respect to other practices and requirements.

A. Requiring a Separate Broadband or Telecommunications Franchise or Right-of-Way Fees on a Franchised Cable Operator is Unreasonable

Certain types of fees generally are not reasonable for purposes of Section 253(c). In particular, for companies with existing authority to place equipment in the public right of way (e.g., a franchised cable operator), no additional authority or fees should be required for activities or equipment that does not place any significant new burden on the right-of-way (e.g., providing a new service over existing plant or overlashing on existing strand). Particularly where a cable

[15] Mobilitie Petition at 24-34.

[16] As NTCA explains, "[p]olicies in this area should not favor one class of providers over another and should ensure that private operators are not unduly disadvantaged by an uneven playing field as it relates to government-owned broadband networks." NTCA Comments at 8.

operator already pays (through its cable franchise fee) for the right to access and utilize the public right-of-way, the addition of broadband or telecommunications services does not impose any additional maintenance or regulatory costs and should not be treated by state or local governments as a revenue-generating opportunity, as such measures needlessly drive up consumer costs, disincentivize broadband adoption, and burden deployment.

Declaring such additional fees unreasonable when applied to providers with existing cable franchises is fully consistent with the Commission's statement in the *Open Internet Order* that reclassification of broadband Internet access service (BIAS) should not serve as justification to require a franchised cable operator to "obtain an additional or modified franchise in connection with the provision of [BIAS], or to pay any new franchising fees in connection with provision of such services."[17] This approach is also good policy. Cable franchises generally contain construction provisions, fees and other protections for the franchisor, and thus already protect legitimate state and local government interests in regulating access to the public rights-of-way and recovering their costs of such regulation. The deployment of new services over franchised cable systems serves the Commission's goal of furthering broadband deployment, while presenting no threat to the existing ability of state and local governments to protect their interests through the operators' franchise agreements.

NCTA is particularly concerned about the implications of a 2016 decision by the Oregon Supreme Court rejecting a challenge to the broadband license fee imposed by the City of Eugene.[18] On top of the five percent franchise fee on video revenue, the City of Eugene has imposed a broadband license fee of seven percent of telecommunications (including broadband)

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[17] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5804, ¶ 433 n. 1285 (2015).

[18] *City of Eugene v. Comcast of Oregon II*, 359 Or. 528 (2015).

revenues,[19] even though adding broadband services to the traditional cable video plant imposes no new burden on the rights-of-way. The city reasons that neither the existing cable franchise nor the franchise provisions in Title VI provided Comcast with a preexisting right to use the public rights-of-way for telecommunications services using facilities it has already deployed.[20] The court agreed and found that this broadband license fee was paid in return for a specific privilege granted to Comcast and therefore not considered a tax that would be barred by the Internet Tax Freedom Act.[21] Of particular relevance here, as part of that analysis the court found that the *Open Internet Order* language cited above was somehow inapplicable because the use of the term "franchising fees" meant the Commission only intended to preclude additional fees on cable service.[22] The court separately found that the application of the seven percent broadband license fee did not violate the five percent cap on franchise fees in Title VI of the Communications Act.[23]

The Commission should send a strong signal that the Oregon Supreme Court misinterpreted the language in the *Open Internet Order* and Title VI and that the Commission does not support ordinances that materially inhibit the provision of broadband or telecommunications services by imposing excessive fees and discriminating among providers of broadband services.[24] The Eugene ordinance's imposition of a license fee of seven percent of telecommunications (including broadband) revenues – on top of the franchise fee equal to five

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[19] *Id.* at 534.

[20] *Id.* at 536.

[21] *See id.* at 539-55.

[22] *Id.* at 554-55.

[23] *Id.* at 555-58.

[24] The Oregon court expressly stated that its decision did not reach the question of whether the Eugene ordinance was valid under Section 253, so that question remains open for resolution by the Commission. *Id.* at 553 n.14.

percent of cable revenues – needlessly adds to the retail cost of broadband service, impeding deployment and adoption, and is not justified by any additional cost or burden incurred by the city.[25] Absent a clear statement from the Commission that such an approach would be presumed to materially inhibit deployment and be neither "fair and reasonable" nor "competitively neutral and nondiscriminatory" under Section 253, we are concerned that other jurisdictions could follow this path and impose new fees on broadband services.[26]

In addition to clarifying that additional fees are not permitted as a condition of providing broadband or telecommunications services over franchised cable systems, the Commission also should explain that franchised cable operators may not be required to obtain an additional local franchise or state certification to deploy facilities necessary for the provision of additional services. Cable operators have encountered this road block in the State of California, where the California Public Utilities Commission has determined that a cable operator must obtain certification as a facilities-based CMRS carrier before it may install wireless equipment on poles.[27] Such a policy is at odds with Section 253(a) because it materially inhibits the ability of cable operators to deliver new and innovative wireless broadband services directly to the public in competition with existing wireless carriers, as well as offer competitive options for small cell and other infrastructure solutions to CMRS providers. Nor is it consistent with the Commission's precedent interpreting the savings clause in Section 253(b).[28] The Commission

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[25] In addition to the 7% broadband license fee, Eugene imposes a 7% license fee and 2% registration fee on Comcast's VoIP and Ethernet transport services, as well as its cellular backhaul services. Further deployment of the latter will be a crucial element in supporting the deployment of 5G.

[26] A number of Oregon communities already are assessing other non-cable services, such as VoIP and Ethernet.

[27] *Decision Denying the Petition to Open a Rulemaking Proceeding to Extend the Right-Of Way Rules Adopted by Decision 16-01-046 to Cable Television Corporations*, Decision 17-02-006 at 17-18 (Feb. 10, 2017).

[28] *See, e.g., New England Public Communications Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19722, ¶ 21 (1996).

should make clear that once a provider has permission to deploy facilities in the public right-of-way, a state or local government may not require separate permission for facilities necessary to provide telecommunications or broadband services.

B. Cable Franchise Obligations Should Be a Relevant Consideration in Assessing Whether State or Local Right-of-Way Obligations are Discriminatory

The Mobilitie petition also asks the Commission to find that "competitively neutral and nondiscriminatory" for purposes of Section 253(c) means "charges imposed on a provider for access to rights-of-way that do not exceed the charges that were imposed on other providers for similar access to the rights-of-way."[29] NCTA generally agrees with this principle, although applying it in practice may present challenges.

The difficulty in considering whether any particular obligation has been imposed in a nondiscriminatory manner for purposes of Section 253(c) is that different types of entities may have different rights and obligations in connection with their use of the rights-of-way. For example, cable operators and wireless providers historically have used different technology and been subject to different regulatory regimes. But as noted above, increasingly these companies will be competing for the same customers by offering the same services using similar networks. Accordingly, any assessment of whether fees imposed on wireless providers are "competitively neutral and nondiscriminatory" for purposes of Section 253(c) should consider the full scope of rights and obligations faced by other providers, including the fact that cable operators are subject to revenue-based franchise fees that are paid as a condition of using the public rights-of-way.

[29] Mobilitie Petition at 32.

CONCLUSION

For all the reasons explained above, NCTA encourages the Commission to take a holistic approach to right-of-way management that encourages deployment by all providers and all technologies, rather than narrowly focusing on small cell deployment. The Commission should focus on eliminating practices that create undue delays or burdens on deployment by any type of provider. In particular, the Commission should make clear that localities may not require a franchised cable operator to obtain an additional franchise or to pay additional fees in connection with the offering of broadband or telecommunications services or to deploy equipment that places no meaningful new burden on the public right-of-way.

Respectfully submitted,

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